

STATE OF CALIFORNIA ENERGY RESOURCES CONSERVATION AND
DEVELOPMENT COMMISSION

In the Matter of:)
Application for Certification of the)
Telsa Power Project)
)
_____)

Docket No. 01-AFC-21

Staff's Reply Brief

December 1, 2003

**REPLY BRIEF OF STAFF
ON THE TESLA POWER PROJECT
APPLICATION FOR CERTIFICATION**

I. Introduction

Staff, Applicant, and Intervenors filed Opening Briefs with the Committee as required on November 3, 2003.¹ The areas of contention between staff and the Applicant continue to be Air Quality and Water Resources. Intervenor, Bob Sarvey, also raised concerns in the additional areas of Biological Resources, Public Health, Hazardous Materials Management, Worker Safety and Fire Protection, Land Use, Visual Resources, and Socioeconomics. Staff believes the discussion we provided in the Opening Brief sufficiently address the issues of Public Health, Hazardous Materials Management, Worker Safety and Fire Protection, and Land Use. Staff refers the Committee and parties to its Opening Brief for these subject areas. This reply brief presents Staff's response to the Air Quality, Water Resources, Biological Resources, Socioeconomics, and Visual Resources issues raised by the Applicant and Intervenors in their Opening Briefs.

II. Staff's Revised AQ-SC7 Provides Complete Mitigation for Significant Adverse Impacts to Air Quality Unlike the Applicant's Proposal

In its Opening Brief, the Applicant summarizes the remaining disputed Air Quality issue as "[w]hether additional emission reductions are necessary above and beyond those that will be surrendered to the Bay Area Quality Management

¹ All parties filed Opening Briefs for the proceeding, except Californians for Renewable Energy, Inc.(CARE). CARE filed a "Request for a Supplemental Evidentiary Hearing in Lieu (sic) of Opening Brief."

District (BAAQMD) and those to be achieved by the Air Quality Mitigation Agreement (AQMA) between Midway and the San Joaquin Valley Air Pollution Control District (SJVAPCD) (Exhibit 22).” The Applicant accepts the basic requirement set forth in Staff’s revised **AQ-SC7**, but argues that it should have a five year “grace period” to implement the measures. The Applicant further argues that Staff has undervalued the PM emission reductions from its proposed road paving offsets. As Staff stated in its Opening Brief, we believe that the revised **AQ-SC7** as proposed by staff will fully mitigate project impacts to a less than significant level and that the modifications proposed by the Applicant would result in a significant adverse impact to air quality in the area. Staff’s responses to the Applicant’s arguments are set forth below.

A. Applicant’s proposed revised AQ-SC7 will not reduce significant adverse impacts to a level of less than significant level because it does not require timely mitigation

As the Applicant notes, “All parties agree that for air quality permitting purposes, the TPP is within the jurisdiction of the BAAQMD. However, the TPP is adjacent to the jurisdictional boundary between the BAAQMD and SJVAPCD.” It is not only the proximity to the SJVAPCD that causes concern for Staff, but the fact that the TPP is physically located within the SJVAPCD airshed, and the SJVAPCD is currently not in attainment for PM² or Ozone. If the Project had been located within the jurisdiction of the SJVAPCD, the Applicant would have been required to provide more offsets than the BAAQMD is currently requiring the Applicant to provide.

The Applicant argues that SJVAPCD is the air quality expert, and because its concerns have been addressed through the AQMA, Staff should not request any

² The SJVAPCD is non-attainment for PM₁₀, and would be considered non-attainment for PM_{2.5}, if required to implement existing standards (per its own admission see RT 9/18/03 p. 142:3-8, 143:8-11), however, as these standards have not been adopted the air district currently only considers PM₁₀. Staff, the Applicant, and the BAAQMD all agree that PM_{2.5} has the potential to cause more harm to human health than PM₁₀. (RT 9/18/03 pp. 154:16-21; 206:13-16; 256:8-25; 257:1-2)

additional mitigation other than that required in the final determination of compliance issued by BAAQMD (Exhibit 23), errata (Exhibit 24), and the AQMA (Exhibit 22). However, the Applicant fails to note that neither the BAAQMD nor the SJVAPCD have conducted a review of project impacts pursuant to the California Environmental Quality Act (CEQA). (RT 9/18/03 pp. 149:10-25, 150:1-3) Staff is charged with conducting a thorough review of potential environment impacts from power plant projects greater than 50MW. (Public Resources Code, § 2500 et seq.) Staff is charged with making independent recommendations to the Committee as to what mitigation – if any -- should be required to reduce potential impacts to less than significant levels.

Staff utilized a similar methodology to the one used by the SJVAPCD in calculating the amount of emission reduction credits that would be necessary to offset the Project's impacts. (Exhibit 54 AQ attachment to Rebuttal Testimony, and RT 9/18/03 pp. 262:6-25; 263:1-3.) Because the impacts will occur on a seasonal basis, Staff modified the SJVAPCD's calculation by including a missing factor of 2 to balance the seasonal value of the offsets being provided. Any offsets required by the Applicant need to be provided in seasons when impacts occur, otherwise the offset is meaningless, and unmitigated impacts will result. Therefore, Staff recommends that the Committee adopt the methodology used by Staff to determine the emission offset amounts for mitigation of the TPP impacts. In adopting this methodology the Committee would also need to ensure that certain mitigation targets are achieved.

As Staff stated in its Opening Brief, the BAAQMD offset package and the AQMA can only provide a complete mitigation package if certain mitigation targets are achieved. Mitigation measures need to be tied to specific action plans in order to be effective in reducing project impacts to less than significant levels. Staff does not believe a plan of unknown efficacy, such as the AQMA, can be relied upon unless it includes realistic performance standards or criteria such as those set

forth in Staff's revised **AQ-SC7**. Staff believes the Applicant's proposed revised condition **AQ-SC7** falls short in this regard.

At the direction of the Committee, Staff, Applicant, and Intervenors had communications prior to filing opening briefs to attempt resolution of the air quality disputes. Although Staff and Applicant appear to agree to the majority of the language in Staff proposed **AQ-SC7**, major areas of dispute remain. The Applicant has proposed its own revised version of **AQ-SC7**. This version includes language that would allow the Applicant to operate for up to 5 years without having to comply with the limits set forth in **Table AQ-SC7a** (seasonal emission limits). (See Applicant's Opening Brief at pg. 9.)

The Applicant argues that it will need five years after starting operation to achieve the reduction targets set forth in the condition. The Applicant argues that because the BAAQMD offset package will be surrendered prior to operation of the TPP, no impact will occur during that time period. This argument ignores the fact that the BAAQMD package alone does not fully mitigate the Project impacts, and that the mitigation provided by the AQMA must be in place at or before commencement of operation. The Applicant believes that operation should not be curtailed by the limits in **AQ-SC7a** until it has had "some time" to achieve the targets of **AQ-SC7b**. This would clearly eviscerate Condition **AQ-SC7** of its intent to provide timely mitigation, as postponing the time limits in **AQ-SC7a** for five years would allow operation of the project before achieving the full mitigation of the AQMA. This could result in an unmitigated adverse impact for those first five years of initial operation. Staff's recommended version of **AQ-SC7** rectifies this problem by allowing partial operation of the power plant within the limits of **AQ-SC7a**, while allowing those limits to be constantly adjusted upwards as the targeted reductions occur. Deferring mitigation measures in the manner proposed by the Applicant is contrary to CEQA and should not be allowed. (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692)

The evidence presented in the proceeding, and arguments presented in this and Staff's Opening Brief, clearly demonstrate that the Applicant's proposed revised **AQ-SC7** will result in unmitigated adverse impacts to Air Quality. Staff urges the Committee to adopt the Staff proposed revised **AQ-SC7** to provide both full mitigation for air quality impacts and flexibility for the Applicant in obtaining that mitigation.

B. PM10 emission reduction targets should rely on accepted calculation methods for the portion of PM2.5 likely to be contained in the PM of the road paving offsets

The Applicant requests that the PM10 emission reduction targets of **AQ-SC7b** be reduced, and the PM10 limit of **AQ-SC7a** be increased, to reflect the amount of PM2.5 reductions the Applicant anticipates from the road paving offsets. The Applicant believes that Staff is applying a methodology that is overly conservative when evaluating the PM10 reductions that could be achieved by road paving. By reviewing U.S. EPA methodologies for estimating emissions, Staff determined that approximately 15 percent of the PM10 emissions from unpaved roads would qualify as PM2.5 (FSA, p. 4.1-42). The Applicant believes this factor should be approximately four times higher based on soil samples. Staff strongly disagrees for a number of reasons. The 15 percent factor used by Staff for the PM2.5/PM10 ratio is a "constant" term established by U.S. EPA guidelines.³ The U.S. EPA guidelines have no provision for allowing site-specific PM2.5/PM10 ratios. According to the guidelines and background documents, which are derived from emission tests at many sites throughout the country, the fraction of unpaved road emissions that would be PM2.5, is practically constant and does not vary with any site-specific parameter, including silt content or moisture.⁴

³ U.S. EPA, AP-42, Compilation of Air Pollutant Emission Factors, AP-42, Fifth Edition, Volume I: Stationary Point and Area Sources, Section 13.2.2, September 1998.

⁴ *Supra*, and see attached letter from U.S. EPA to BAAQMD, dated November 7, 2002. Staff requests that this letter be marked as Exhibit 125, and be entered into evidence. Staff is prepared to address the letter, which was docketed on December 1, 2003, during the subsequent hearings the Committee intends to convene on the subject of Air Quality related to the testimony filed on November 3, 2003.

If the Applicant had chosen to use site specific information rather than the AP-42 formula to determine the PM_{2.5} content it would need to conduct additional testing and comply with U.S. EPA protocol set forth in AP-42. Although the Applicant asserts that soil conditions include a high fraction of PM_{2.5}, it is not clear whether the air district staff was present during collection of the soil samples. In comments on the method used to calculate the road paving offsets, the U.S. EPA stated that only one sample was collected for each road segment, which can introduce significant sampling bias, and that the range between silt content values seems to confirm that more samples should be required.

Furthermore, the Applicant has not tested the existing emissions from the unpaved roads to determine whether the ratio of PM_{2.5}/PM₁₀ emissions would deviate from the EPA's constant. (See attached proposed Exhibit 125.) We would note that the EPA guidelines were used by BAAQMD when the district determined the PM₁₀ value of the road paving offset. Thus, Staff's PM_{2.5} estimate is compatible with both the EPA Guidelines and the BAAQMD's PM₁₀ estimates.

In summary, because the Applicant attempts to use the soil data in a way that would be inconsistent with established guidelines, Staff cannot recommend changing the PM_{2.5}/PM₁₀ ratio. There is no evidence to support adjusting the ratio of PM_{2.5}/PM₁₀ emissions upward. Staff recommends maintaining the 15 percent ratio that was used in the FSA and maintaining the PM₁₀ emission reduction target identified in our Opening Brief. Reducing the PM₁₀ emission reduction target of **AQ-SC7b** would reduce the efficacy of Staff's recommended PM₁₀ mitigation, which would result in unmitigated PM₁₀ impacts.

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C. The revised AQ-SC7 as proposed by Staff will ensure that significant adverse impacts are mitigated to a level of less than significant, and is supported by the analysis in the FSA

Staff proposed a revised **AQ-SC7** in supplemental testimony filed November 3, 2003 (Exhibit 124 pp.4-8), and in its Opening Brief also filed November 3, 2003 (Staff Opening Brief pp. 5-7). In developing this condition, Staff considered input from the Applicant and Intervenors.⁵ The revised **AQ-SC7** offers the Applicant flexibility in mitigating potential significant adverse impacts to air quality in the local and regional area. The Applicant has flexibility with revised **AQ-SC7** in that it has an option to either provide the necessary offsets upfront to mitigate impacts, or to emit less pollutants in order to ensure that no unmitigated impacts to air quality occur. Staff believes that the revised condition presented to the Committee in Staff documents filed on November 3, 2003, (Exhibit 124 pp.4-8) should be required in order to mitigate adverse environmental impacts to air quality that would otherwise be caused by TPP operation. Staff urges the Committee to adopt its proposed **AQ-SC7** to ensure full and timely mitigation of potential adverse impacts to air quality that would otherwise result.

III. Staff's Proposed Conditions in the Areas of Biological Resources, Socioeconomics, and Visual Resources Will Ensure that the Project Impacts are Fully Mitigated

a. Because the Applicant will be required to provide an appropriate management plan, including the name and contact information for the habitat management entity, the Project's impacts to Biological Resources will be fully mitigated

As Intervenor Sarvey notes, when the project was initially proposed, the United States Fish and Wildlife Service (USFWS) did not support locating TPP on this particular site, and that therefore the site is not appropriate for a power plant. The USFWS was concerned about potential adverse impacts to San Joaquin kit fox. (Exh 51 p. 4.2-13, and Exhibit 60.) However, as Susan Jones testified

during TPP evidentiary hearings, through an extensive consultation over the last 18 months between Applicant, California Department of Fish and Game (CDFG), and Staff, a satisfactory mitigation plan has been developed to ensure impacts to endangered species in the area – including kit fox -- will be less than significant. (RT 9/18/03 p. 96:12-25, and 97:1-22.)

Intervenor Sarvey also expresses concern that a habitat mitigation bank is located adjacent to the proposed TPP site. Mr. Sarvey claims that a power plant would be incompatible with the adjacent Haera Mitigation Bank. (Intervenor Sarvey Opening Brief pp. 11-14.) Staff investigated the relationship of these two facilities, consulted with USFWS, CDFG, and Wildlands, Inc., (managers of the Haera Mitigation Bank) on many biological resources issues, and concluded in the FSA that upon implementation of all proposed mitigation, the project will not cause a significant adverse impact to biological resources, nor will it detract from the value of the Haera Mitigation Bank. (Exhibits 51, 52, 53, 54, Staff Opening Brief pp.11-17.)

In order to ensure that the TPP does not detract from the value of the Haera Mitigation Bank, Staff needs confirmation from the Applicant and Wildlands that an appropriate Habitat Management Plan will be in place prior to site mobilization. The Applicant in both oral communications with Staff, and during the hearings, has stated that it intends to utilize Wildlands as the habitat management company for purposes of TPP Biological Resources mitigation implementation (Habitat Management Plan submitted 9/11/03 page 5). To date, Staff has not received confirmation from Wildlands, Inc., or the Applicant that Wildlands, Inc., will in fact be the entity managing habitat mitigation lands for TPP. Because successful implementation of the proposed habitat compensation is extremely important, Staff will continue to request verification of the third party

⁵ Staff considered information presented by the Intervenor during the evidentiary hearing on September 18, 2003, written concerns, and comments presented during a conference call that included all the parties prior to the filing of testimony.

habitat management entity, so that the biological resources mitigation measures can be successfully implemented, should the Commission grant certification.

Additionally, the Applicant has not provided a sufficient Habitat Management Plan (HMP). Although a draft was provided to staff during the hearings on September 11, 2003, the draft HMP exhibits serious shortcomings. These shortcomings must be discussed and resolved prior to start of site mobilization. (Exh 51 p. 4.2-46.) Staff has included language in **BIO-13** to ensure that the HMP is reviewed by the parties and agencies, and approved prior to start of site mobilization. Staff will address any additional concerns regarding this matter through a supplemental filing, or in its comments, on the Presiding Members Proposed Decision (PMPD).

- b. Staff has properly evaluated populations that fall under Environmental Justice statutes in its analysis of the Project impacts. Additionally, if Staff recommended mitigation is adopted there will be no unmitigated impacts to low income, minority, or any other population from the Project**

Intervenor Sarvey argues that Staff has not properly considered Environmental Justice Local Ordinances, Rules and Standards, (LORS) in this proceeding. Mr. Sarvey does not cite to the specific LORS he is referring to, nor does he state how Staff fails to properly consider Environmental Justice issues in this proceeding.

Staff has consistently considered potential impacts to low income and minority populations in this and other power plant proceedings. (Exhibit 51 p.4.8-7-4.8-8.) Additionally, Staff believes if its recommended mitigation for this Project is adopted no significant adverse impacts will occur as a result of the TPP. Therefore, if the Project's impacts are mitigated to less than significant there will be no disproportionate impact to low income and minority communities. As to potential disproportionate impacts that may be suffered by low income and minority populations in the area of air quality, again Staff conducted an

appropriate cumulative air quality analysis and believes if the Committee adopts Staff's proposed conditions of certification for air quality, any potential impacts will be mitigated to less than significant.

The Intervenors have not produced any evidence that would contradict Staff's recommendations concerning potential disproportionate impacts to low income or minority populations. Intervenors, additionally, have not presented any legal arguments that demonstrate any misapplication of Environmental Justice LORS.

Therefore, Staff would request that the Committee adopt Staff's proposed mitigation for the TPP, and find that there will not be a disproportionate impact to low income or minority populations.

c. If Staff's recommended mitigation is adopted there will be no significant adverse impacts from the Project in the area of Visual Resources

Intervenor Sarvey states in his Opening Brief that "CEC Staff testimony indicates that the project will have significant adverse impact at 3 of the 7 KOP's that it analyzed. (Exhibit 51 p. 4.11-45.)" (Intervenor Sarvey Opening Brief p. 14). Mr. Sarvey also states that "[t]his will violate several Alameda County general plan ordinances. . . (Policy 115, 114, 107, 106A, 113B etc.)" (Intervenor Sarvey Opening Brief p.14). Mr. Sarvey does not specifically state how these policies will be violated, or cite any communication with Alameda County staff. In the FSA, Staff concludes that with mitigation, there will be no significant adverse impacts to Visual Resources, and that TPP complies with all Visual Resource LORS. (Exhibit 51 pp. 4.11-35-4.11-42.) The FSA references several communications with Alameda County staff, and provides a full analysis, including the specific rationale for determining whether the project has the potential to cause a significant adverse impact to Visual Resources. Staff also identified mitigation measures and described how they will be implemented. Staff urges the Committee to look to the factual information presented during the

proceeding in this area, and to find that Staff's proposed conditions of certification will mitigate any impacts to a less than significant level.

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IV. In Order to Properly Conserve Valuable State Resources, and Comply with State Water Policy the Commission Should Adopt Staff's Recommendation for Use of Reclaimed for Cooling Water and Landscape Irrigation Purposes by TPP

The Applicant states that it "does not oppose the use of reclaimed water at the TPP, but must insist on reasonable conditions governing its use." (Applicant's Opening Brief, p. 17.) Staff believes based on existing state policy, recently affirmed by the Commission in the Final 2003 Integrated Energy Policy Report (IEPR), adopted November 12, 2003, supports Staff's conclusion that its recommended conditions are not only reasonable, but necessary to ensure the most efficient use of State water resources. At this time, the Applicant appears to concede that requiring the use of reclaimed water is a reasonable requirement. The Applicant has abandoned its opposition to a condition requiring the use of the City of Tracy's (the City) reclaimed water. (Applicant's Opening Brief p. 17.) This is a welcome change.

However, the Applicant requests that two additional conditions apply to the requirement that recycled water be used at the proposed power plant. These conditions are neither appropriate nor justified.

First, the Applicant requests that the recycled water supply be required to be "commercially available." The Applicant requests that if the City of Tracy cannot deliver the reclaimed water for use by the power plant under its terms, that it be allowed to use its originally proposed water source without having to file for an amendment to approve the change in water source. Second, the Applicant argues that a determination by an independent auditor that concludes financing difficulties would result from utilizing the City's reclaimed water would allow the

Applicant to use its originally proposed potable water supply without seeking an amendment from the Commission. Staff addresses both of these issues below.

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a. The Commission should not accept the Applicant's definition of "Commercially Available" as This Definition is Unnecessary and Inconsistent with Standard Industry Practice

The Applicant argues that unless certain specific contract terms are contained in the agreement between it and the City, the reclaimed water supply would be commercially unavailable and therefore economically infeasible. (Applicant's Opening Brief p. 14.) Those conditions were identified by Mr. Derrel Grant during the September 12, 2003, TPP hearings, and include a contract term of 35 years, a reliable interim water supply, a commitment that the City will deliver up 5,900 AF/year of water at all times, a requirement that the reclaimed water will meet Title 22 unrestricted use standards, and reasonable and customary commercial terms. (Applicant's Opening Brief p. 14-15.) Staff believes the evidence demonstrates that City water of appropriate quality will be available for TPP use on a long-term basis, and that the additional conditions are unnecessary. Moreover, the Applicant's arguments are disingenuous, as the Applicant is not asking for the same conditions and requirements in the potential agreement for the Applicant's proposed potable water supply. The evidence supports the conclusion that the Applicant will be able to negotiate a viable water supply agreement with the City of Tracy. The Commission's decision should require the Applicant to do so, while allowing the Applicant to seek an amendment to the license in the unlikely event that this cannot be achieved. The Committee should not dictate the particular commercial terms of that agreement.⁶

⁶ The Applicant has not reached final agreement for its proposed potable water supply, and made no request that the Committee dictate the commercial terms of that agreement. In fact, the Applicant withheld that agreement from Staff, arguing that such disclosure could adversely affect negotiations. This was apparently true even when the agreement became public. RT 9/12/03 pp. 103:1-25; 104:1-23; 128-129.)

i. Term.

The Applicant states that a “term of 35 years is necessary to accommodate the life of the asset that will be reflected in financings.” (Applicant’s Opening Brief p.15.) However, the Rio Bravo-Rosedale Water Storage District testified that the contract for the Applicant’s proposed water supply could not extend beyond the existing contract the supplier currently held with DWR. This contract ends in 2035. This means that the maximum term for the contract for the Applicant’s proposed water supply is 31 years (not accounting for construction time). (RT 9/11/03 p. 233:4-10) Additionally, the City testified that it was willing and open to discussion that would allow for a contract term of more than 20 years. The City explained that the 20-year provision, set forth in its letter of January 28, 2002, was simply the period in which recycled water could be supplied at no cost before the cost would be adjusted for the balance of the term of the agreement (Exhibit 65). Further, the City has consistently expressed its willingness to supply recycled water to TPP for the life of the project as evinced in its January 28, 2002, letter to the Applicant providing preliminary terms and conditions for a recycled water supply agreement (See Condition 12 Exhibit 65).

ii. Interim/Start Up and Back Up Water Supplies.

The Applicant states that it must have a contract requiring the City to provide a reliable interim water supply until recycled water is available, and as a backup water supply. (Applicant’s Opening Brief pg. 15.) As an initial matter, we note that this imposes more requirements on the recycled water supply contract than the potable water supply contract, for no apparent reason. In fact, the sole backup water supply for the project if the potable source is used is an on-site raw water/firewater storage tank with a capacity of 8,365,000 gallons of water for plant operation. The quantity held in the tank is only sufficient for 24-hour interruption to water supply during summer peak conditions. (Exhibit 1 p 3-34.) Staff was originally concerned that there was no additional backup water supply proposed for the project and issued a data request asking for further information

on this issue. The Applicant responded to data request 141 by stating, “The water supply system described in the AFC has no backup infrastructure.” (Exhibit 3, p. 75) Thus, the Applicant proposed to have only a very limited back-up water supply initially. Only after Staff indicated that it would request that the use of recycled water be required did the Applicant state that significant additional back-up would be required.

Moreover, the City has proffered a reliable start-up (or “interim”) supply in the unlikely event that the power plant is on line prior to the WWTP being on-line. (RT 9/12/03 pp.173:18-25; 174.) Thus, the additional conditions requested by the Applicant are unnecessary and should not be included in the conditions of certification.

iii. Reliability.

The Applicant’s request for additional conditions also ignores the fact that the recycled water supply will be as reliable as the potable supply. The City’s wastewater treatment plant (WWTP) is required to be very reliable. The City must ensure proper treatment and discharge of the wastewater in order for sewer systems within the City to properly function and to comply with its NPDES requirements. (Exhibit 66, RT 9/18/03 pp. 172:6-25- 173:1-17.) In order to protect public health and safety, the WWTP must include numerous redundancies to ensure minimal outage time. In consideration of the high degree of reliability achieved by municipal wastewater treatment systems, the Commission has already approved (and is considering) other power plants that rely solely on recycled water supply with no backup water supply. These projects include the San Joaquin Valley Energy Center (SJVEC) and Palomar Energy Projects. The Applicant also testified during evidentiary hearings on September 12, 2003, that it did not contend to have concerns regarding the reliability of the reclaimed water supply. (RT 9/12/03 p. 204:6-11.) Therefore, Staff believes that the evidence presented supports a finding that the City’s

reclaimed water supply is equally reliable as the Applicant's proposed water supply.

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iv. Quality and Timing.

The Applicant states that the Commission decision should specify that the water contract require provision of water that meets or exceeds Title 22 unrestricted use standards. (Applicant's Opening Brief p. 15.) Mr. Bayley, Deputy Director of Public Works/Utilities for City of Tracy, stated both in his written testimony and oral testimony during hearings that the WWTP is scheduled to be substantially complete and capable of producing Title 22 water for the TPP prior to June 2006. (Exhibit 55A; RT 9/12/03 p172: 19-24.) The City has consistently expressed its willingness to supply recycled water consistent with Title 22 standards. (See Condition 4 Exhibit 65.) Staff has consulted with the City of Tracy, reviewed state standards and requirements for Title 22 unrestricted use water and concluded that the City of Tracy will be able to serve the TPP with Title 22 unrestricted use water by the anticipated power plant operation date of June 2006.⁷ (Exhibit 51pp. 4.13-34-4.13-36; 55A; 54pp. 9-15; and RT 9/12/03 pp.172:12-24; 173:18-25;174.)

v. Unspecified Commercial Terms.

The final "term" proposed by the Applicant is "Reasonable and customary commercial terms." (Applicant's Opening Brief 15.) This phrase is vague and ambiguous and could mean anything. The City has already testified that it is willing to work with the Applicant in reaching reasonable mutually agreeable terms that would be considered standard for municipal entities providing similar

⁷ The WWTP is anticipated to be in operation prior to June of 2006. In the event that it is not able to fully serve TPP, the City has stated it will have an interim potable water supply available to serve TPP pending full operation of the WWTP. (RT 9/12/03 p. 173;18-25; 174.)

services. (Exhibit 55 A, RT 9/12/03 p.177:15-25 and 178: 1.) Staff has provided to the City recycled water supply agreements used for other projects that have come before the Commission. The City is using these as a form for its agreement for serving recycled water to TPP. The Applicant has likewise testified that it is willing to work with the City to reach mutually agreeable terms and conditions for delivery of reclaimed water. (RT 9/12/03 p. 37:20-25-38:1.) Therefore, this condition seems to be meaningless and arbitrary. What is “reasonable” and “customary” must be mutually agreed to by both the contract parties, not unilaterally dictated by the Applicant. If the reclaimed water is reasonably available, the Committee should require the Applicant to utilize it as its primary cooling water supply for TPP. In the event that there is an irreconcilable difference, the Applicant can so inform the Committee and the Committee can counsel the parties, and/or determine whether an amendment to the license is in order. The Committee should not delegate that authority to the Applicant.

vi. Cost

The Applicant also states that the total cost for the use of reclaimed water from the City “must be comparable to the total cost of using the proposed water supply.” The Applicant infers that “comparable” means “the same as or less than.” State water policy, as reflected in the recently adopted IEPR, requires the use of reasonably available reclaimed water. The IEPR states, “the Energy Commission will only approve the use of fresh water for power plant cooling purposes by power plants when alternative water supply sources and cooling technologies are shown to be “environmentally undesirable” or “economically unsound.” (IEPR at 27.) Staff interprets this policy to mean that if reclaimed water is available at a reasonable cost, considering industry standards, and what other power plant developers are paying for similar water over the same period of time, the Applicant will be required to use the reclaimed water source. The evidence in this proceeding demonstrates that the City’s reclaimed water is

available at a reasonable cost and that it would not be economically unsound to require the Applicant to use this cooling source for the TPP. During the course of the proceeding, Staff updated its cost analysis on two occasions as more specific cost data became available. These updates included consideration of several factors that could influence the bottom line by developing a high and low range of estimates. Staff's cost analysis was performed at the level of detail typically used in the industry for comparison of alternatives and decision-making, and the results demonstrate that the cost of serving recycled water from the City of Tracy to TPP are reasonable and comparable to the proposed project . (Exhibits 54 pp. 9-15; RT 9/12/03 pp. 152:2-5, 153:12-25; 154-165:1-14.)

Applicant and Staff disagree about the cost of using reclaimed water for TPP cooling process and landscape irrigation purposes, and about what would be considered economically unsound. Applicant has suggested that an independent third party be delegated the determination of what should be considered economically unsound for purposes of the cost of using reclaimed water. Staff recommends that the Committee not incorporate this proposal into its decision, for the reasons set forth below.

b. Allowing an independent auditor to determine what cost is reasonable for purposes of availability would be an unlawful delegation of the Commission's authority under the Warren-Alquist Act

As stated in Staff's Opening Brief, the Commission has broad authority, under the Warren-Alquist Act, to specify conditions for the permitting of a project. Public Resources Code section 25216.5 gives the Commission the authority to "formally act to approve or disapprove applications, including specifying conditions under which approval and continuing operation of any facility shall be permitted."

Public Resources Code section 25500 gives the Commission exclusive authority to permit power plants 50 megawatts and above. The Commission's permit is in lieu of all other local, regional, and state permits. (Pub. Resources Code § 25500.) Thus, the Commission stands in the place of, and has the permitting authority of, all such governmental entities that would have jurisdiction over a project, but for the Commission's exclusive jurisdiction.

Additionally, Public Resources Code section 25218 gives the Commission authority to “. . .adopt any rule or regulation, or *take any action, it deems reasonable and necessary to carry out the provisions of this division.*” (Pub. Resources Code § 25218 emphasis added.)

Government Code section 7 states that when a public officer is granted powers or duties it is that officer or those authorized by the officer that carries out those powers and duties. (Gov. Code § 7.) In this case the Commission has been granted the exclusive power to certify all thermal power plants 50 megawatts or greater. This power is to be exercised by the Commission, not delegated to a third part independent auditor. Ultimately it is the Commission that is responsible to the public for the proper certification of TPP, not the independent auditor. It is the Commission, and the Committee as delegated by the Commission, that must decide whether it would be economically unsound in terms of state policy.

The Commission as the exclusive permitting entity for thermal power plants 50 megawatts and above, has a responsibility to consider all potential impacts of certification, including the potential impact on California's fresh water supply. The Commission does not limit its assessment of availability strictly to an individual Applicant's financing options. The Commission must consider potential harm to the public, standard industry practices, and reasonable cost of similar water being used for similar purposes. In this case, Staff believes that the evidence presented supports a finding that the City's water is available both from an environmental and economic perspective. Staff would urge the Committee to require the use of the City's reclaimed water as the primary cooling process and landscape irrigation water source for TPP, if the Commission finds that this water

supply is available. It is the Commission's role not that of an independent auditor, to determine whether the Project complies with all applicable LORS, including state policy as set forth in the IEPR. If the Applicant and the City are not able to reach mutually agreeable contract terms, the Applicant would be free to return to the Commission with a proposed amendment and present any new information to the Commission at that time. This new information could include an assessment by a third party, but the assessment would be provided for the Commission's consideration, not as the determining factor as to which water supply the Applicant will use for cooling water and landscape irrigation purposes.

V. Conclusion

Staff believes that the evidence and arguments presented in this case support Staff's recommended Conditions of Certification for the TPP. The remaining outstanding issues in the areas of Air Quality and Water Resources should be resolved by adoption of Staff's proposed revised condition of certification AQ-SC7, and a condition of certification that requires the Applicant to utilize the reclaimed water from the City for power plant cooling purposes. Doing so will result in mitigation of all potential significant adverse impacts to a level of insignificance, and ensures that the Project will comply with all applicable LORS.

Respectfully submitted,

DATED: December 1, 2003

DARCIE L. HOUCK
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